IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1046

CELIA STRICKLAND, ET AL., *Petitioners*,

v.

HUMBLE OIL & REFINING COMPANY, ET AL., *Respondents*,

AND

JASPER POOL, ET AL., *Petitioners*

v.

HUMBLE OIL & REFINING COMPANY, ET AL., *Respondents*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF AUTHORITIES

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To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Respondents, HUMBLE OIL & REFINING COMPANY, ET AL., who were defendants and appellees below, respectfully submit that the Petition for a Writ of Certiorari should be, in all things, denied.

Opinion Below

The Circuit Court of Appeals by its unanimous opinion rendered January 17, 1944, and reported in 140 Fed. (2d)

83-87 (R. 566-570), affirmed the March 5, 1942, final judgment of the District Court for the Southern District of Texas (R. 66-85), which was entered pursuant to an unpublished memorandum opinion by the trial judge which reviews some of the more pertinent facts and applicable laws prohibiting recovery by petitioners (R. 61-66).

Statement of the Case

This is a local civil action in "Trespass to Try Title" between private parties, brought in 1937 by petitioners as alleged heirs of *one* Wilson Strickland who died in 1841, seeking to recover land in Montgomery County, Texas; which land was patented by the State of Texas to *a* Wilson Strickland in 1847, and of which respondents and their predecessors in title had been bona fidely claiming and exercising ownership for many years.

The *sole issue* to which the evidence was confined on the trial, and which was submitted to the jury (under Rule 49, FEDERAL RULES OF CIVIL PROCEDURE) was whether the Wilson Strickland under whom petitioners asserted their claim, was the same man as Wilson Strickland, the Texas patentee.

The jury found that he was *not the same man* (Final Judgment, R. 66, 71). *This single fact issue* determined the entire controversy, and judgment was accordingly entered for defendants, respondents here (R. 66-85).

This is one of innumerable suits filed against these respondents by many mutually antagonistic groups and families, each seeking to recover the same land from respondents ninety years after the Patent was issued to Wilson Strickland—during all of which period neither petitioners nor any other persons ever asserted any claim against the title of respondents and their predecessors in interest.

Each such family presented a different Wilson Strickland and each contended that their particular Wilson Strickland was the 1847 grantee of the land sued for. Many of the suits were filed in the United States District Court and many in the State District Court of Montgomery County, Texas (R. 129-141, 153-161).

The motivating cause of said suits was the 1932 discovery of oil in the Conroe Oil Field (R. 383), and the consequent newspaper publicity (R. 218, 285, 290).

Petitioners were parties to the consolidated Cause No. 18,253-A which was tried to a jury in the State District Court from August of 1940 to August of 1941; and many members of petitioners' family affirmatively appeared therein and introduced all of the deposition evidence relied upon by petitioners in the present case (R. 136-150, 157-167). Special Issues were submitted to the jury in the State Court with reference to the thirteen Wilson Stricklands there presented (including the Wilson Strickland urged by petitioners), and the jury found that none of them was the Wilson Strickland, Patentee (R. 137-141, 157, 160). Respondents recovered judgment in the State Court case.

The land in controversy is a portion of one-third of a league of land which was purchased by Wilson Strickland, to whom, and to whose heirs and assigns, it was patented July 3, 1847 (Ex. 2, R. 172). His right to purchase the stated quantity of land at the price paid was predicated on, and was by reason of, statutory proof by said Wilson Strickland of the following facts:

(1) He immigrated to Texas in 1829 (during the time the 1825 Colonization Law of Coahuila and Texas was in effect);

(2) He was a single man;

(3) He was actually a citizen of Texas on March 2, 1836, when Texas declared her independence of Mexico;

(4) He was a continuous resident of Texas from his 1829 immigration to his March 16, 1838, proof before the Board of Land Commissioners (Ex. 7, R. 215-216).

The uncontroverted documentary proof, concerning the Wilson Strickland under whom petitioners claim, conclusively established that petitioners' Wilson Strickland could not have been the Wilson Strickland, patentee. The memorandum opinion of the trial judge demonstrates this conclusion (R. 60-66).

Reply to Petitioners' "Reasons for Granting the Writ"

1st.

The decision of the Circuit Court of Appeals in this cause is not in conflict with any Texas court decisions nor with any decision of any other Circuit Court of Appeals. The Circuit Court of Appeals in this cause did not hold "That identity of name did not presumptively show identity of person," as stated at page 8 of the petition for certiorari. (See Opinion R. 567-568.)

In BYERS v. WALLACE (Tex. Sup. Ct.), 28 S.W. 1056, at page 1058, the Supreme Court of Texas said in a case quite similar to the present litigation:

> "It is the law of this character of cases that the plaintiff must recover upon the strength of his own title, and not upon the weakness of the defendants' title; that is, the plaintiffs must have shown a right in themselves, or

failed, notwithstanding it did not appear that the defendants had any right whatever."

The Board of Land Commissioners of Harrisburg County, Republic of Texas, issued a certificate to Wilson Strickland, pursuant to his March 16, 1838 proof, reading in part:

> "This is to certify that Wilson Strickland appeared before me, the Board of Land Commissioners for the County of Harrisburg, and proved according to law that he *arrived* in this country *in eighteen hundred and twenty-nine* and that he *is a single man* and entitled to one-third of a league of land. * * * " (Ex. 7, R. 215-216.)

The findings by the Board of Land Commissioners (1) that Wilson Strickland immigrated to Texas in 1829; (2) that he was a single man, and (3) that he was entitled to one-third of a league of land, are conclusive of said facts and are binding on all persons claiming under said certificate and the July 3, 1847, patent issued by virtue thereof.

> Southwestern Settlement & Development Co. v. Village Mills (Tex. Civ. App.), 245 S.W. 975;
> McNeil v. O'Connor, 79 Tex. 227, 14 S.W. 1058;
> Houston Oil Co. v. Hayden (Tex. Sup. Ct.), 135 S.W. 1149;
> Burkett v. Scarborough, 59 Tex. 495.

In addition, it was mandatory that said Wilson Strickland be a resident of Texas from the inception of his claim for a headright (his immigration in 1829) until his March 16, 1838, appearance before the Board of Land Commissioners.

> Act of December 14, 1837, Secs. 13 and 16;
> Linn v. State of Texas, 2 Tex. 317;
> Board of Land Commissioners v. Reily, Dallam Reports (Tex.) 381.

Petitioners' Wilson Strickland was a married man from 1809 to 1840 (Ex. 16, R. 293; Ex. 15, R. 292), did not leave the State of Georgia after 1809 (R. 376) and therefore could not have been the Wilson Strickland, patentee.

Respondents affirmatively proved the presence of the petitioners' Wilson Strickland in the State of Georgia, where he lived, during the period from 1829 to 1838 when the true Wilson Strickland was required to be, and found to be, in Texas. (Between 1832 and his 1841 Will; Ex. 50-52, R. 352-357, and his 1841 Will, Ex. 3, R. 174; *1834:* Ex. 54, 55, R. 358; *1835:* Ex. 56-57, R. 358-359; *1836:* Ex. 59, R. 360; *1837:* Ex. 62, 63, R. 363-374; *1838:* Ex. 64, 65, R. 364-365.)

Respondents further proved that, whereas, the true Wilson Strickland executed each document by his mark, the petitioners' Wilson Strickland *signed* each instrument shown to have been executed by him (with the sole exceptions of his March 9th, 1841, will and a March 15, 1841 deed—which instruments were executed shortly before his death). (Ex. 58, R. 359; Ex. 43, R. 316-321, 322, 326, 335; Ex. 44, R. 342-344; Ex. 47, R. 348-350; Ex. 66, R. 365-366.)

The testimony of petitioners and others show that contemporaneously with Wilson Strickland, the patentee, and petitioners' Wilson Strickland, there were still other Wilson Stricklands in the State of Georgia, as well as in other states. (Petitioners' testimony: R. 193-194, 196; 278-281; 285-286; 288-289; other testimony: R. 410-478; 495-521; 526-529; Ex. 107-110, R. 521-525; Ex. 115-118, R. 532-538; Stipulation: R. 157-160; Court's Memo, R. 65 (N. 6).) Petitioners even contended that there were two Wilson Stricklands (one besides their own in Gwinnett County, Georgia. (Appellant's brief 199-201; Court's Memo, R. 65.)

SOUTHWESTERN SETTLEMENT & DEVELOPMENT CO. v. VILLAGE MILLS (Tex. Civ. App.), 245 S.W. 975, states the true rule concerning the presumption of identity of person

arising from identity of name. In that case, the Frederick Lewis was found and recited in the certificate of the Board of Land Commissioners to be a single man, whereas appellants' Frederick Lewis was a married man. The court held:

> "It is not a rule of law but only a rule of evidence. If the evidence casts no suspicion on the transfer a presumption arising from the identity of names is conclusive; but *if the evidence raises an issue against the identity of person, then the burden rests on the person advancing the title to prove the identity* and that is appellants' condition in this case. * * * "
>
> * * *
>
> "It appears then from the face of appellants' title, on facts revealed by this title, that the *presumption of identity* of person because of identity of name *does not arise* in appellants' favor. On the face of this title, the Frederick Lewis named in the certificate *could not have been* the Frederick Lewis named as grantor in the Samuel Rogers deed."

See, also:

> McNeil v. O'Connor, 79 Tex. 227, 14 S.W. 1058;
> Malone v. Dick, 94 Tex. 419, 61 S.W. 112.

The only two items of similarity between the Wilson Strickland, Patentee, and petitioners' Wilson Strickland were (1) that they had the same name, and (2) that the Texas Wilson Strickland signed each of his documents by mark and petitioners' Wilson Strickland signed the last two of his numerous documents, by mark.

The evidence not only raised an issue against the identity of petitioners' Wilson Strickland and cast suspicion thereon, but conclusively demonstrated that he *could not have been* the Wilson Strickland, Patentee.

Petitioners cite several cases at pages 9 to 11 of their petition, but they are not authorities for the position taken.

BOWLIN v. FREELAND, 289 S.W. 721 (relied on by petitioners and erroneously cited as BORDEN v. FREELAND, 189 S.W. 721), was a case in which no evidence contrary to the claimed identity of person was introduced, nor was any suspicion cast upon the identity. The partial and incorrectly copied excerpt from the opinion in the petition is not contrary to the holding by the Circuit Court of Appeals in the present case.

MCDOEL v. JORDAN, 151 S.W. 1178, relied on by petitioners, held merely that the identity of names was sufficient identification " * * * in the absence of other evidence * * * ." There was no contrary evidence.

PYLE v. DAVISON, 116 S.W. 823, was another case cited by petitioners and in which there was no other evidence of identity, nor any suspicious circumstances. The grant referred to in a conveyance was actually dated May 27, 1835, but erroneously referred to as dated May 28, 1835.

MAREINISS v. SHEERAN, 31 Fed. (2d) 976 (erroneously cited at page 10 of the petition as MARIMEIS v. SHEERAN, 31 Fed. 976), was another case involving no contrary evidence nor suspicious circumstance. The excerpt from said case was incorrectly copied at page 10 of the petition.

FAUST v. UNITED STATES, 163 U.S. 452, 41 L. Ed. 224, cited by petitioners, presented no issue of identity. The defendant was indicted as *Faust*, whereas, his true name was *Foust*. The defendant was personally present in court and the rule of idem sonams was correctly applied.

MILLER & LUX, INC., v. PETROCELLI, 236 Fed. 846, to which petitioners refer, involved the estate of "*Pietro Spina*, sometimes known as *Peter Spino*." Additional proof of identification was made and no contrary evidence appeared. The principle of idem sonams was applied.

It is interesting to note that at page 11 of the petition it is stated that all other Wilson Stricklands had been definitely accounted for and put out of the picture by stipulated facts, but that petitioners failed to mention the fact that their Wilson Strickland was likewise so accounted for and definitely put out of the picture in the same State Court trial (R. 158).

2nd.

The decision of the Circuit Court of Appeals in this cause is not in conflict with any Texas court decisions nor with any decision of any other Circuit Court of Appeals in holding, in effect, that the burden of proof does not shift to the defendant in a Trespass to Try Title action.

The Supreme Court of Texas has clearly announced the rule:

> "*The burden of proof never shifts from the plaintiff to the defendant, but it is upon the plaintiff throughout the trial* to establish by a preponderance of the evidence the affirmative of the issue or issues upon which he relies for a recovery. There is an old and well-settled rule that the burden of proof rests upon the plaintiff to establish his case by a preponderance of the evidence."
>
> Boswell v. Pannell (Tex. Sup. Ct.), 180 S.W. 593, 595; Byers v. Wallace (Tex. Sup. Ct.), 28 S.W. 1056, 1058; See, also, Authorities, supra.

Petitioners overlook the definite difference and distinction between (1) burden of proof and (2) burden of evidence.

22 Cor. Jur., 67-69.

The quotation from 22 COR. JUR., at page 13 of the petition should be continued to the conclusion of the sentence, partially quoted, so that the rule might be accurately stated:

"When such a prima facie case is established the *burden of evidence* is shifted to the party who has not the affirmative of the issue, although the position of the *burden of proof* is in no way affected."

22 Cor. Jur., Sec. 21, page 76-78.

SMITH v. GILLON (Tex. Sup. Ct.), 15 S.W. 796, relied upon by petitioners at page 13, involved land granted in 1835 to *Asahel Savery*. An 1837 deed (properly proven) recited that the grant was to *Asal Savory* and said deed was signed by *A. Savery*. Appellees were claiming under the 1837 deed, and appellant claimed as a devisee of the original grantee. There was no evidence to dispute the deed in any way, except the spelling of the name—which was sufficiently explained by evidence in the record so that " * * * it should remove any reasonable suspicion, if any, which might arise as to the identity * * * ." The case is therefore inapplicable to the present case.

Petitioners here were never able to make a prima facie case, as the very documents on which they necessarily relied, that is, the above mentioned March 16, 1838 certificate by the Board of Land Commissioners, and the Patent issued pursuant thereto, showed that the true Wilson Strickland immigrated to Texas in 1829 and was a single man, whereas, petitioners' Wilson Strickland never left the State of Georgia after 1809 (until shortly before his 1841 death in Arkansas) and was a married man from 1809 to 1840.

Thus the evidence on which petitioners relied, and by which they were conclusively bound, not only did not make a prima facie case in their behalf, but destroyed any possibility of their recovery.

At page 14 of the petition, it is stated:

"Appellants' Wilson Strickland fought in the war in Texas and acquired land while in Texas (R. 374)."

The witness on whom petitioners relied for such statement was a member of their family (R. 164, 166, 370), and testified " * * * that he fought in battles out here in Texas and then returned to Georgia and married Miss Polly Connally; he married her about 1809; and after his marriage remained there in Georgia and died about 1841" (R. 376).

The war by which Texas won her independence from Mexico was in 1836.

3rd.

Petitioners' 3rd point involves a purely procedural matter of introduction of evidence which, under the facts and law hereinabove mentioned, could not conceivably affect petitioners' right to recover.

Under the record and under the law the evidence was admissible. The witness was repeating declarations of a deceased party made at a time when he knew all of the facts concerning the land; knew that Allen Vince had claimed in the 1840's that the declarant's Wilson Strickland had sold him the land; and said declarant was making no claim to the land (R. 503-504).

As stated by the trial judge in his March 24, 1942 Memorandum overruling appellants' motion for new trial:

> "The Court had previously admitted similar testimony in behalf of plaintiffs and intervenors over objections of defendants. Had the Court not admitted such testimony in behalf of plaintiffs and intervenors, their case could hardly have gone to the jury at all.
>
> "In my judgment the evidence complained of was admissible upon the issue of identity; but if it was not admissible, then plaintiffs and intervenors had no basis whatever upon which to take their case to the jury" (R. 96).

4th.

Petitioners complain of a further procedural matter, to-wit: the Court's Charge.

The court repeatedly told the jurors that they were the sole and exclusive judges of the facts, the credibility of the witnesses and the weight to be given their testimony, and expressly instructed the jury to "determine this case according to your own notions under the Court's Charge as to the law and as to what the facts are. The jury is to determine that, exclusive of any interference or suggestion from the judge."

The court properly told the jury that the burden of proof was upon the plaintiffs and intervenors to establish the affirmative of the issue submitted. The Charge of the Court was entirely without error.

California Ins. Co. v. Union Compress Company, 133 U.S. 417, 33 L. Ed. 730, 738;
Blanton v. Great Atlantic and Pacific Tea Co. (C.C.A. 5th), 61 Fed. (2d) 427, 430;
Boswell v. Pannell (Tex. Sup. Ct.), 180 S.W. 593.

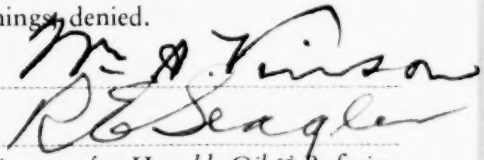
There are numerous inaccuracies in the Petition for Certiorari. We feel, however, that the foregoing will thoroughly demonstrate that under the facts and the law, petitioners could not recover in any event, and we refrain from further lengthening this brief to correct petitioners' inaccuracies.

Conclusion

This is a fact case in which the jury found that petitioners' Wilson Strickland was not the Wilson Strickland, Patentee of the land in controversy. The uncontradicted evidence compelled said jury finding and prohibited any other answer to

the sole fact issue submitted. In the light thereof, the alleged evidentiary and procedural errors, even had they occurred, would be immaterial.

We respectfully submit that the Petition for Writ of Certiorari should be, in all things, denied.



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